United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

w/affidavit

75-4107

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4107

ANTONIO MARTINEZ,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

THOMAS J. CAHILL,
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CASES CITED

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RESPONDENT'S BRIEF

Issue Presented

WHETHER THE ORDER OF THE BOARD OF IMMIGRATION APPEALS, AFFIRMING THE DECISION OF THE IMMIGRATION JUDGE, AND DENYING THE PETITIONER'S MOTION TO REOPEN HIS DEPORTATION PROCEEDINGS WAS AN ABUSE OF DISCRETION.

Statement of the Case

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Antonio Martinez petitions this Court for review of the denial of his motion to reopen his deportation proceedings entered by the Board of Immigration Appeals (the "Board") on May 28, 1975. That order dismissed the petitioner's appeal from the order and decision of an Immigration Judge denying the alien's motion to reopen in order that

Martinez might apply for the discretionary relief of suspension of deportation under Section 244(a) of the Act, 8 U.S.C. § 1254(a).

The petitioner contends that the Board's order should be set aside because the Immigration Judge erred in concluding that Martinez was ineligible for suspension of deportation and further that the Immigration Judge did not inform the petitioner of the provisions of Section 244 of the Act during his deportation hearing. This petition, seeking review of the Board's order, was filed on June 9, 1975. Since the date of filing this petition, the alien has enjoyed the automatic statutory stay of deportation which accompanies a petition for review filed pursuant to Section 106 of the Act.

Statement of the Facts

The petitioner is a 42 year old alien, a native and citizen of the Dominican Republic. He was admitted to the United States on January 25, 1967 as a nonimmigrant visitor for pleasure authorized to remain in this country until July 24, 1967. He failed to depart upon the expiration of his authorized visitation and has been illegally residing and employed in the United States since that time.

On October 31, 1974 the Immigration and Naturalization Service (the "Service") commenced deportation proceedings with the issuance of an order to show cause and notice of hearing. The deportation hearing was conducted on November 1, 1974 wherein the petitioner was represented by privately retained counsel. Further, an official interpreter was provided by the Service to insure complete comprehension of the proceedings by the alien. During the hearing the alien conceded deportability and sought a bond reduction, as well as, the discretionary privilege of voluntary departure under Section 244(e) of the Act,

8 U.S.C. § 1254(e). Both applications for relief were granted by the Immigration Judge. The Immigration Judge entered an order granting the alien the privilege to depart voluntarily on or before December 27, 1974. An alternative order of enforced deportation was also entered if the alien failed to voluntarily depart as represented at the hearing. Appeal was waived and the order became final. 8 C.F.R. § 242.20.

On December 27, 1974, one day prior to the expiration of his voluntary departure period the alien, by his present counsel, moved to reopen the deportation proceedings for the purpose of applying for suspension of deportation under Section 244(a) of the Act. In the motion the alien merely alleged that he had been physically present in the United States since January 25, 1967, was of good moral character, and that his deportation would result in extreme hardship to himself. On February 20, 1975 the Immigration Judge entered a written order and decision denying the alien's motion to reopen the deportation proceedings. That decision noted that the alien was a native of the Dominican Republic, an adjacent island as defined in Section 101(b)(5) of the Act, 8 U.S.C. § 1102(b)(5) and consequently he was ineligible for suspension of deportation in that he had failed to demonstrate his ineligibility to obtain a special immigrant visa. See Section 244 (f) of the Act. The decision further noted that the alien was married to a United States citizen at the time of these proceedings and the existence of that marital status thereby rendered him eligible for consideration as a special immigrant. Finally, the decision noted that although the alien alleged his deportation would result in extreme hardship the motion papers did not substantiate this allegation. In conclusion the Immigration Judge found the alien's motion papers failed to set forth a prima facie case for suspension of deportation. On March 7, 1975 the alien appealed the decision of the Immigration Judge to the Board of Immigration Appeals.

On May 1, 1975 the Board affirmed the decision of the Immigration Judge and dismissed the petitioner's appeal.

Relevant Statute

Immigration and Nationality Act, 63 Stat. 163 (1952) as amended:

> Section 244, 8 U.S.C. § 1254—
>
> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;
>
> (f)
>
> * * * * *

Relevant Regulation

Title 8, Code of Federal Regulations (CFR):

> § 103.5 *Reopening or reconsideration.*
>
> Except as otherwise provided in Part 242 of this chapter, a proceeding authorized under this chapter may be reopened or the decision made therein reconsidered for proper cause upon motion made by the party affected and granted by the officer who has jurisdiction over the proceeding or who made the decision. * * * A motion to reopen shall state the new facts to be proved at the reopened proceeding and shall be supported by affidavits or other evidentiary material. A motion to reconsider shall state the reasons for reconsideration and shall be supported by such precedent decisions as are pertinent. Motions to reopen or reconsider shall state whether the validity of the order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. Rulings upon motions to reopen or motions to reconsider shall be by written decision. . . .

ARGUMENT

The Board of Immigration Appeals did not abuse its discretionary authority in declining to reopen the deportation proceeding to permit the alien to apply for suspension of deportation.

A. The reopening of a deportation proceeding is a matter of discretion.

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation proceeding. The Attorney General, under his broad grant

of authority to administer and enforce the Act,* has promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. § 242.22, provides in pertinent part that motions to reopen "will not be granted unless the Special Inquiry Officer is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing." Additionally, 8 C.F.R. 103.5 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material." See also 8 C.F.R. § 3.8.

Clearly, the regulations contemplate that a motion to reopen contain an offer of evidence, that the evidence be heretofore unobtainable, and that the evidence be sufficient to warrant the grant of the relief sought. Accordingly, the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. Where such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. With this in mind, we now turn to examine the nature of the relief sought by this petitioner and the evidence he offered in support of his motion.

B. Suspension of deportation.

Suspension of deportation pursuant to Section 244(a) of the Act, 8 U.S.C. § 1254(a), is the ultimate form of relief available to a deportable alien. An alien whose application is approved has his deportability cancelled and obtains status adjustment to that of a permanent

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* Section 103(a) of the Act, 8 U.S.C. § 1103(a).

resident without having to leave the United States. Authority to grant or deny this relief is vested within the sound discretion of the Attorney General. *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957). Those applications which are approved by the Attorney General must be referred to the Congress for final legislative approval. Section 244(c) of the Act, 8 U.S.C. § 1254(c); *McGrath* v. *Kristensen*, 340 U.S. 162 (1950).

In order to qualify for suspension of deportation, an alien must first satisfy certain objective requirements contained in the statute. He must establish that he has been physically present in the United States for at least seven consecutive years immediately preceding his application, and that he had been a person of good moral character during that period. He must also convince the Attorney General that his deportation would result in extreme hardship to himself or to a close relative who is a citizen or resident alien of this country.*

The applicant for suspension of deportation has the burden of showing that he meets these prescribed conditions. 8 C.F.R. 242.17(d); *Kimm* v. *Rosenberg*, 363 U.S. 405 (1960), *rehearing denied*, 364 U.S. 854; *Brownell* v. *Cohen*, 250 F.2d 770 (D.C. Cir. 1957). If he fails to establish statutory eligibility, the application must be denied as a matter of law. Attainment of the statutory minimum, however, does not mean that relief will be automatically granted. The alien who satisfies the statutory requirements still has the burden of convincing the Attorney General that he merits the favorable exercise of discretion. *Hintopoulos* v. *Shaughnessy*, *supra*; *Wong Wing Hang* v. *Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966); *Ng* v. *Pilliod*, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860.

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* The qualifying relative must be the alien's spouse, child or parent. Section 244(a)(1) of the Act, 8 U.S.C. § 1254(f)(1).

Accordingly, when making his motion to reopen, it was incumbent upon this petitioner to offer evidence to show not only that he was statutorily eligible but that he merited the extraordinary relief he sought as a matter of discretion.

C. The Immigration Judge properly concluded that Martinez was statutorily ineligible for suspension of deportation under Section 244(f) of the Act.

At the time the Immigration Judge considered Martinez' motion to reopen the record of proceedings, he reflected that the alien was still married to a United States citizen and was therefore ineligible for suspension of deportation under Section 244(f) of the Act. Although, his citizen spouse had withdrawn the visa petition previously submitted on his behalf nothing in the file indicated that the marriage had terminated. At the time the Immigration Judge considered this motion it was still possible for Martinez' spouse to submit a new petition on his behalf thereby making him eligible for consideration for a special immigrant visa.* Nevertheless, at the time the Immigration Judge decided this motion, the alien had submitted no evidence to show that the legal relationship had terminated or that divorce proceedings had been instituted. Only on appeal to the Board did the alien finally allege that divorce proceedings had been instituted. Nonetheless, even during the Board's

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* It is not uncommon for visa petitions such as that involved in this action to be withdrawn and subsequently refiled by the petiting spouse. The reason for this may relate to domestic disagreements which are subsequently resolved, or may be the result of calculated reasons such as fraud or dilatory tactics in order to stay deportation pending the adjudication of a renewed petition.

de novo consideration of the alien's motion Martinez failed to submit the required evidence substantiating this assertion. See 8 C.F.R. §§ 3.2, 3.8, 103.5. Nor did Martinez submit the required evidence substantiating his statutory eligibility for suspension of deportation under Section 244(a) of the Act. See Subsection (D) infra. On appeal the Board properly affirmed the decision of the Immigration Judge, not only because the record reflected that Martinez was still married to a United States citizen but also, as will be discussed, because he had failed to submit with his motion to reopen the required evidence demonstrating his statutory eligibility and the equities in his case which would tend to provide a basis for the granting of this extraordinary discretionary relief under Section 244(a) of the Act.

D. In the absence of any supporting evidence, the alien's motion to reopen was properly denied.

Even if Martinez had submitted evidence that his marriage to a United States citizen had been legally terminated, the Immigration Judge and the Board acted properly in denying the motion to reopen. In support of the alien's motion to reopen his deportation proceedings Martinez merely alleged that he had accrued seven years physical presence in the United States; that he had been a person of good moral character and; that his deportation would result in an extreme hardship to himself. These items, if true, would tend to establish statutory eligibility to be considered for suspension of deportation. There was, however, no offer of proof of facts to show that these allegations were true, nor was there any supporting evidentiary material to demonstrate a prima facie case that Martinez was statutorily eligible for suspension and that he merited the favorable exercise of that extraordinary discretionary relief. In his decision the Immigration Judge discussed the inadequacy of Mar-

tinez's motion papers as they related to Section 244(a) of the Act, as well as, his statutory ineligibility for suspension under Section 244(f) of the Act, 8 U.S.C. § 1253 (f) at the time of that motion.

In addition to his statutory ineligibility for suspension of deportation the alien's failure to comply with the aforementioned regulations provided an independent and sufficient ground to deny his motion to reopen. The Courts have continuously affirmed the discretionary refusal to reopen deportation proceedings based upon a failure to comply with the applicable regulations. See *Novinc* v. *Immigration and Naturalization Service*, 371 F.2d 272, 273 (2d Cir. 1967); *Luna-Benalcazar* v. *Immigration and Naturalization Service*, 414 F.2d 254, 265 (6th Cir. 1969); *Tupacyupanqui-Marin* v. *Immigration and Naturalization Service*, 447 F.2d 603, 607 (7th Cir. 1971).

The petitioner contends that because he asserted statutory eligibility, the Immigration Judge and the Board were required to reopen the deportation proceedings. Martinez contends that the denial of his motion to reopen deprived him of the opportunity to present evidence relative to his application for suspension of deportation, and that whether or not he would ultimately be granted discretionary relief is immaterial because it is only through evidence obtained at a reopened hearing that the decision whether or not to grant relief can be made. Clearly, this contention ignores the express requirements of the above-mentioned regulations regarding the form and sufficiency of a motion to reopen.

The record of proceedings in this case is barren of any evidence demonstrating any outstanding equities in favor of this petitioner or showing that his deportation would result in an extreme hardship as that term is used in reference to Section 244(a) of the Act, 8 U.S.C.

§ 1254(a). While the petitioner refers to his age and health, the record does not sufficiently reflect facts that would support his contention that, in his situation, these factors establish a case of extreme hardship. While the alien readily places the blame for this lack of evidence on the Immigration Judge and his former attorney he fails to acknowledge that he shoulders the burden of proof in these proceedings. Martinez had ample opportunity to present evidence demonstrating the existence of any equities in his case when he submitted his motion to reopen to the Immigration Judge. Furthermore, he had a second opportunity to do so upon his appeal to the Board where the suspension issue was reviewed *de novo*.

In passing on cases within its jurisdiction, the Board is expressly authorized to exercise any of the Attorney General's authority and discretion appropriate and necessary to the disposition of a case. 8 C.F.R. 3.1(d). It has long been the practice of the Board to make its own determinations on questions of law and fact and on whether discretionary relief should be granted *Wadby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 278, n.2 (1966); *DeLucia* v. *Immigration and Naturalization Service*, 370 F.2d 305, 308 (7th Cir. 1966), *cert. denied*, 386 U.S. 912. In the present case where the regulations require an evaluation of proffered evidence before a motion to reopen can be granted the Board properly exercised its discretionary authority in dismissing the appeal from the decision of the Immigration Judge.

E. Scope of review

The only issue presented in this petition for review is whether or not the Board abused its discretionary authority in denying the petitioner's motion to reopen. As we have indicated, the grant or denial of a motion to reopen is discretionary. *Novinc* v. *Immigration and Naturalization Service*, 371 F.2d 272 (2d Cir. 1967). The scope of

judicial review is extremely narrow. *Muskardin* v. *Immigration and Naturalization Service*, 415 F.2d 865 (2d Cir. 1969); *Zupicich* v. *Esperdy*, 319 F.2d 773 (2d Cir. 1963). Where, as here, the bare assertions made by Martinez would not result in a grant of the relief sought, the denial of such a motion is not an abuse of discretion. *Cheng Kai Fu* v. *Immigration and Naturalization Service*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968).

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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THOMAS H. BELOTE,
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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

CA 75-4107

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 19th day of February, 19 76 she served a copy of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Robert F. Greenstone, Esq.,
Pollack & Kramer, Esq.,
225 Broadway
NY NY 10007

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

19th day of February, 19 76

Ralph L. Lee

RALPH L LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977